

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 24, 2004

CLAYTON TURNER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Sullivan County
No. C46,354 Phyllis H. Miller, Judge

No. E2002-02895-CCA-R3-PC
April 1, 2004

The petitioner, Clayton Turner, was convicted of rape of a child, incest, and assault and received an effective sentence of thirty-one years in the Department of Correction. He later sought both direct and post-conviction appeals, both of which were denied by this court and our supreme court. Subsequently, he filed a petition for post-conviction relief based on the Post-Conviction DNA Analysis Act, see Tenn. Code Ann. § 40-30-403, which was dismissed. He appeals that dismissal, arguing that the post-conviction court erred in not appointing an expert to assist with his request for DNA analysis. Following our review, we affirm the post-conviction court's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and NORMA MCGEE OGLE, JJ., joined.

Wayne R. Stambaugh, Morristown, Tennessee (on appeal), and Mark Harris, Kingsport, Tennessee (at trial), for the appellant, Clayton Turner.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner was convicted in 1998 of rape of a child, incest, and assault against his two stepdaughters and received an effective thirty-one-year sentence. His convictions and sentence were affirmed by this court on direct appeal, and our supreme court denied application for permission to appeal. See State v. Clayton Eugene Turner, II, No. 03C01-9805-CR-00176, 1999 WL 817690, at *1 (Tenn. Crim. App. Oct. 6, 1999), perm. to appeal denied (Tenn. Apr. 24, 2000).

Subsequently, the petitioner filed a petition for post-conviction relief, which was denied. This court affirmed the denial, concluding that the petitioner had not been denied the effective assistance of counsel at trial and that the post-conviction court had not erred in denying his request for the appointment of experts in the fields of DNA analysis and the transmission of infectious diseases. See Clayton Eugene Turner v. State, No. E2001-02476-CCA-R3-PC, 2002 WL 31174209, at *1 (Tenn. Crim. App. Oct. 1, 2002), perm. to appeal denied (Tenn. Feb. 18, 2003).

While the appeal of his initial post-conviction proceeding was pending in this court, the petitioner, on April 1, 2002, filed a *pro se* “Petition for Post Conviction Relief Pursuant to T.C.A. § 40-30-401 et seq.” The petitioner requested DNA testing of evidence in the possession of the State. Counsel was subsequently appointed, and an amended petition was filed on June 21, 2002, wherein the petitioner requested the court to “appoint an expert in DNA testing to assist counsel for the Petitioner in proper preparation of the Amended Post-Conviction Petition which states with particularity how further DNA testing would demonstrate Petitioner’s innocence.”

At the October 4, 2002, hearing on the petition, during which only the arguments of counsel were presented, the post-conviction court noted that DNA testing had been performed on the relevant evidence and was introduced at trial. The court also noted that the petitioner had confessed to raping one of the victims and that the DNA analysis of the semen found in the victim’s vaginal area matched the petitioner. A copy of the petitioner’s confession and the Tennessee Bureau of Investigation laboratory report containing the DNA results were admitted as exhibits at the hearing. The laboratory report stated that the DNA profile of the sperm from the vaginal swabs of the victim was consistent with the petitioner and that the “probability of selecting an unrelated individual at random having a matching DNA profile from: The white population is approximately 1 in 3,100. The black population is approximately 1 in 170,000.”

The post-conviction court dismissed the petition by written order filed on November 4, 2002. In its order, the post-conviction court noted that this court, in our opinion released on October 1, 2002, upheld the denial of appointment of expert assistance for this indigent, noncapital post-conviction petitioner under Davis v. State, 912 S.W.2d 689, 697-97 (Tenn. 1995).

ANALYSIS

The petitioner argues that the post-conviction court erred in dismissing his petition and in denying his request for appointment of a DNA expert, saying that additional DNA testing is needed because trial counsel was “unable to properly examine and/or investigate any of the previously submitted DNA evidence due to his lack of knowledge of both DNA testing and the laws and/or Rules of Evidence of the State of Tennessee as they pertain to the use of scientific evidence.” The State responds that the petitioner has “failed to prove a necessity for further DNA analysis” and that he is not entitled to appointed expert assistance.

The Post-Conviction DNA Analysis Act of 2001 allows a defendant convicted of certain crimes, including rape of a child, to petition the court at any time for DNA analysis of evidence in

the possession or control of the State. See Tenn. Code Ann. § 40-30-403. Courts will order DNA testing when:

- (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
- (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
- (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
- (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-404. This court has held that “[t]he failure to meet any of the qualifying criteria is, of course, fatal to the action.” William D. Buford v. State, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110, at *6 (Tenn. Crim. App. Apr. 24, 2003), perm. to appeal dismissed (Tenn. Sept. 2, 2003).

Tennessee Code Annotated section 40-30-405 provides:

After notice to the prosecution and an opportunity to respond, the court may order DNA analysis if it finds that:

- (1) A reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
- (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
- (3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
- (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

In dismissing the petition, the post-conviction court found:

The petitioner is not entitled to appointment of expert assistance in this cause, as this is not a capital post-conviction proceeding. Davis v. State, 912 S.W.2d 689, 696-97 (Tenn. 1995); Turner, No. E2001-02476-CCA-R3-PC, p.7.

Even if further DNA testing established that there was error in the first analysis or that the defendant was excluded by more refined analysis as the source of the semen taken from the victim's vagina, this would mean only that another person had also raped the victim. The victim in this case was a child less than thirteen years of age; therefore consent is not a defense, and consensual sexual activity with others is not an issue, particularly as the petitioner confessed to sexually penetrating the child victim.

The Court also finds that no reasonable probability exists that further DNA testing would have rendered the petitioner's sentence more favorable if such testing had been available at trial. Again, this was rape of a child, the Petition[er]'s step-daughter. If she had been the victim of another rapist, it would have only made her plight more pitiful and the Petitioner, as her step-father, more blameworthy.

We agree with the post-conviction court's determination. The petitioner was convicted of rape of a child against his stepdaughter. The results of DNA testing, which established that the semen found in the victim's vaginal area matched the petitioner, as well as the petitioner's confession, were admitted at trial. Thus, the petitioner's claim fails pursuant to Tennessee Code Annotated section 40-30-405(1), (3), and (4) because he confessed to penetrating his stepdaughter and the sample recovered from her, which he sought to have tested, already had been subjected to DNA analysis which showed that he was the donor.

As to the petitioner's request for the appointment of a DNA expert, this court has previously determined this issue in our opinion on the petitioner's original post-conviction petition:

Finally, the Defendant argues that the trial court erred by denying the Defendant's post-conviction request for the appointment of experts in the fields of DNA analysis and the transmission of infectious diseases. He asserts that the experts could have "resolved the question of whose semen was recovered from the victim" and "whether the herpes carried by [the Defendant] had to have been transmitted to the alleged victim if he had committed the offense he was convicted of committing." Our supreme court has previously addressed the Defendant's claim in Davis v. State, 912 S.W.2d 689

(Tenn. 1995). "[T]he state is not required to provide expert assistance to indigent non-capital post-conviction petitioners." Id. at 696-97. "In Tennessee there is no rule or statute that entitles a non-capital post-conviction petitioner to state funded expert assistance." Id. at 695. Furthermore, "[i]n the absence of a Constitutional right to counsel, there can be no Constitutional right to support services at state expense." Id. at 696. In accordance with our supreme court's decision in Davis, this issue is without merit.

Clayton Eugene Turner, 2002 WL 31174209, at *6.

In the petitioner's previous post-conviction proceeding, this court agreed that the post-conviction court was correct in denying funds for a DNA expert to assist the petitioner. Once again, we conclude that the post-conviction court correctly denied such funds.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the post-conviction court's dismissal of the petition.

ALAN E. GLENN, JUDGE